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|---|-------------|----------------------|---------------------|------------------|
| APPLICATION NO.                           | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
| 10/736,457                                | 12/15/2003  | Erik J. van der Burg | 014139US1           | 3098             |
| 38107                                     | 7590        | 10/05/2010           | EXAMINER            |                  |
| PHILIPS INTELLECTUAL PROPERTY & STANDARDS |             |                      | BATES, DAVID W      |                  |
| P. O. Box 3001                            |             |                      | ART UNIT            | PAPER NUMBER     |
| BRIARCLIFF MANOR, NY 10510                |             |                      | 3775                |                  |
| MAIL DATE                                 |             | DELIVERY MODE        |                     |                  |
| 10/05/2010                                |             | PAPER                |                     |                  |

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

|   |                                      |  |
|---|--------------------------------------|--|
| <b>Advisory Action<br/>Before the Filing of an Appeal Brief</b> | <b>Application No.</b><br>10/736,457 | <b>Applicant(s)</b><br>VAN DER BURG ET AL. |
|   | <b>Examiner</b><br>DAVID W. BATES    | <b>Art Unit</b><br>3775                    |

*–The MAILING DATE of this communication appears on the cover sheet with the correspondence address –*

THE REPLY FILED 20 September 2010 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1.  The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a)  The period for reply expires \_\_\_\_\_ months from the mailing date of the final rejection.
- b)  The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### NOTICE OF APPEAL

2.  The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

#### AMENDMENTS

3.  The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because

- (a)  They raise new issues that would require further consideration and/or search (see NOTE below);
- (b)  They raise the issue of new matter (see NOTE below);
- (c)  They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
- (d)  They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: See Continuation Sheet. (See 37 CFR 1.116 and 41.33(a)).

4.  The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).

5.  Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.

6.  Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).

7.  For purposes of appeal, the proposed amendment(s): a)  will not be entered, or b)  will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: \_\_\_\_\_

Claim(s) objected to: \_\_\_\_\_

Claim(s) rejected: **27-32 and 46-61**

Claim(s) withdrawn from consideration: \_\_\_\_\_

#### AFFIDAVIT OR OTHER EVIDENCE

8.  The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).

9.  The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fail to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).

10.  The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

#### REQUEST FOR RECONSIDERATION/OTHER

11.  The request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
See Continuation Sheet.

12.  Note the attached *Information Disclosure Statement(s)*. (PTO/SB/08) Paper No(s). \_\_\_\_\_

13.  Other: \_\_\_\_\_

/Thomas C. Barrett/  
Supervisory Patent Examiner, Art Unit 3775

/D. W. B./  
Examiner, Art Unit 3775

Continuation of 3. NOTE: Independent claims 27 and 46 are amended such that further search and consideration is required for at least these claims.

Continuation of 11. does NOT place the application in condition for allowance because: Independent claim 50 remains rejected as presented in the final action of July 19, 2010. Applicant argues that the functional limitation "for attachment to a hyoid bone" makes the instant invention distinct from the Jackson reference. Applicant argues that because Jackson is designed for wedging between two opposing faces of two different bone structures, that Jackson is not acceptable for use in a hyoid bone. Even further, the way that the Jackson device would be attached to the hyoid bone makes the device unacceptable for the task since the Jackson device would interfere with the patient's pharynx, for example. The size of the Jackson device is brought into question.

Respectfully, as claimed, the only requirement is "attachment to a hyoid bone". No provision for the patient's pharynx is claimed. Further, Applicant has admitted that the device would be capable for attachment (at least wedging against) the hyoid bone. This is considered to be sufficient to read on the broad functional limitation of "for attachment to a hyoid bone". For example, the hyoid bone could be from an animal of a different species, or the device could be for a procedure on a hyoid bone performed *in vitro*, in which case, there is not even a patient present. Claiming physical limitations which clarify the distinctions between the prior art and the instant invention are required to achieve patentability of at least claim 50. For example, claiming that the device provides for a space for passage of the patient's pharynx would overcome the rejection of claim 50.

Applicant further argues that being "wedged" against a bone is not equivalent to "being attached". By the broadest reasonable interpretation of the claimed limitations, "for attachment" does not overcome the wedging of the Jackson device. Attachment is defined as "The act attaching, or state of being attached; close adherence or affection; fidelity; regard. [1913 Webster]" Claiming the attachment as "permanent attachment", or "attachment by fasteners" would overcome the rejection in view of the "wedging" attachment provided by the prior art.